



REPUBLIC OF KENYA



In re Estate of the Late Irene Fransisca Khayo (Deceased) (Succession Cause 3145 of 2013) [2024] KEHC 2515 (KLR) (Family) (7 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3145 OF 2013
HK CHEMITEI, J
MARCH 7, 2024**

BETWEEN

EMILY MUSEWE ODONGO APPLICANT

AND

ABRAHAM OBONYO HONGO RESPONDENT

RULING

1. By her application dated 19th February 2020 the Applicant prays for the following orders:-
 - (a) That the order granted on 3rd February 2020 confirming the rectified grant issued on 25th July 2018 be stayed pending the hearing and determination of the application.
 - (b) That the order given on 3rd February 2020 confirming the rectified grant issued on 25th July 2018 be revoked and the applicant granted leave to file a protest affidavit and present an alternative mode of distribution of the deceased net estate.
 - (c) That in the alternative and without prejudice to two above the order given on 3rd February 2020 confirming the rectified grant issued on 25th July 2018 be reviewed and or varied in the manner proposed at paragraph 10 of her affidavit filed herewith.
2. The application is supported by the sworn affidavits of Emily Musewe Odongo and Paul Amuga advocate sworn on the same date.
3. The gist of the application is that the Applicant was not aware of the matter when it came up for an application for rectification of the grant. The error they deponed was on the part of her counsel Paul Amuga who failed to diarise the date.



4. She went on to state that as a result of the said failure to attend, the matter proceeded without her input especially on the division of the deceased assets.
5. The deponent has gone ahead to accused the Respondent of failing to consider that the estate owed some Kshs 552,609 to one Jayne Adipo Odongo being school fees she paid for one of the deceased children Amelia Ndenga.
6. She stated as well that the said child does not stay with the Applicant hence the need to have considered her favourably when distributing the estate. She also stated that the said child had special medical conditions hence the need to have taken this into consideration when distributing the estate.
7. It was therefore her case that the estate needs to be redistributed afresh and consider one Peter Odongo Bubolo the father to the deceased.
8. The capital asset in particular namely Ngong /Ngong /52067 ought to be held in trust for the children.
9. Paul Amuga advocate, basically deponed that he was unable to attend to the matter despite being served as the same was not brought to his attention by the staff in his office. He therefore stated that he took responsibility for the failure on the part of the applicant to file an appropriate response.
10. The Respondent vide his replying affidavit sworn on 28th February 2022 opposed the application vehemently. He deponed that the reasons advanced by the Applicant were not sufficient to revoke the grant.
11. He said that the argument that he had discriminated against his children was far from the truth. He accused the Applicant of orchestrating the maintenance of the minor Amelia, whom she was given custody courtesy of a court order at the Children Court, namely case No 1118 of 2014.
12. He went on to depose that there was no debt in the estate and indeed all that the said Jayne Adipo Odongo did in terms of the minors fees was pursuant to the rights she possessed having been handed over the custody of the minor. The same according to him cannot be termed a debt to the estate.
13. He also denied that he had not been supportive of the child medically since he had included her in his medical cover by UAP Insurance company.
14. He denied that he had been cruel to the child or at all.
15. As regards the Ngong property he stated that he was a joint owner with the deceased and therefore it was not available for distribution.
16. The Respondent prayed for the application to be dismissed and have the matter laid to rest noting that the distribution undertaken was fair to all and especially to the children. He stated that his father in law was a retiree who continued to enjoy his pension.
17. The court directed the parties to file written submissions. At the time of writing this judgement it was only the Respondent whose submission was on record.
18. The court has perused the same extensively including the cited authorities and wishes not to reproduce the same here.

Analysis and Determination

19. The first issue to determine is whether the reasons given by the Applicant and in particular her counsel for failing to appear in court on the specific date when the matter came up in court holds any water.



20. I think to the extent that he was served and his office failed to diarise, the same is an inexcusable. This was purely office dynamics which ideally cannot be brought to bear against the respondent. It ought to be an issue between the advocate and her client. See *Duale Mary Ann Gure v Amina Mobamood & Another* [2014] eKLR.
21. I have perused the other reasons advanced by the Applicant against the orders rectifying the grant and the court wishes to state as hereunder.
22. If it is true that one Jayne Adipo Odongo paid fees and other upkeep for the minor, Amelia, then the same was courtesy of Milimani Children's case no 1118 of 2014 in which the court granted her custody. In the said matter there was no order that the deceased estate was to support the said child.
23. In any event she did not make an application to that effect and therefore she is estopped from asking for such a refund from the estate. She did so wilfully having elbowed the Respondent from supporting and maintaining the minor.
24. As regards her special medical condition, the averments by the Respondent that the minor is covered in his medical insurance under UAP Insurance Company was not controverted or challenged. I take it that the child is still enjoying the Respondent's medical cover as provided by his employer.
25. As regards the parcel of land, namely Ngong /Ngong /52067 the same to the extent that it was registered jointly with the deceased will pursuant to section 91(4) (b) of the *Land Registration Act* no 3 of 2012 vest under the respondent for all intent and purposes. The Applicant's arguments therefore fail on this ground.
26. Section 76 of the Succession Act on the grounds of revoking a grant states as follows;
A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion –
 - a. That the proceedings to obtain the grant were defective in substance;
 - b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
 - c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently;
 - d. That the person to whom the grant was made has failed after due notice and without reasonable cause either –
 - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - ii. To proceed diligently with the Administration of the estate; or
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or
 - (e) That the grant has become useless and inoperative through subsequent circumstances”.



27. I respectfully do not find the grounds advanced in the application herein within the four corners of the above cited section of the law. Even for argument sake I do not find the ratio in the grant unreasonable. The minors and their father have each gotten equal share. The deceased father has been given 6%.
28. There is no evidence for instance that the deceased supported her father. She died at a youthful age of 32 years. The father has been said to enjoy his retirement pension which he has not disputed. Getting 6% from her daughter's estate is a plus considering that the children are still young.
29. The court takes notice as well that the minors will still enjoy the provisions from the Respondent other than the amount held in trust for them.
30. As regards Amelia, the Applicant has nothing to worry as her 31% is well secure just like her younger sister. Needless to state that her medical situation is well taken care of by the Respondent.
31. The court would have been considerate of the application if indeed the distribution was skewed against the minors in particular. I believe as well that when the court granted the orders it must have taken time to consider the situation of the minors and how their mother's estate was benefiting them.
32. For now, I do not find any reason to allow the application. The turf war between the Applicant and her brother in law and by extension the rest of the family members must rest. Let the minors enjoy whatever their mother left for them. At any rate the Applicant who is a sister to the deceased still holds sway by virtue of being a joint Administrator herein.
33. In the premises the application is disallowed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 7TH DAY OF MARCH 2024.

H K CHEMITEI

JUDGE

